In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1102

AVCO COMMUNITY DEVELOPERS, INC.,
Appellant,

vs.

SOUTH COAST REGIONAL COMMISSION,
an agency of the State of California, and
CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION,
an agency of the State of California,
Appellees.

On Appeal from the Court of Appeal of the State of California, Second Appellate District, Division Four

Motion to Dismiss or Affirm

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The California Coastal Commission, successor in interest under California Public Resources Code section 30331 to appellees South Coast Regional Commission and California Coastal Zone Conservation Commission, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal or to affirm the judgment of the Court of Appeal of California.

The two questions presented in the Jurisdictional Statement filed by appellant are so insubstantial as not to need

further argument. Moreover, one of the two, appellant's claim to a vested right to build, is foreclosed by a previous decision of this Court. In *Dobbins v. Los Angeles,* 195 U.S. 223 (1904), this Court held that if a person receives a permit allowing him to proceed with construction of a project, and thereafter in good faith reliance on said permit does so proceed, then such person has a vested right to complete *the project which had been authorizd by said permit* in spite of subsequent changes in law prohibiting such project. This is the same rule which the California Court of Appeal applied in this case. The second question is based on facts alleged by appellant which are not substantiated in the record of the proceedings in the courts below.

QUESTIONS PRESENTED

Appellant, Avco Community Developers, Inc., has not fairly stated the questions. The two questions that appellant presents in its Jurisdictional Statement are properly stated as follows:

(1) May a vested right exemption from having to comply with subsequent changes in law applicable to construction extend beyond the scope of the governmental permit being relied upon or is the exemption limited to whatever was authorized under such permit? A developer, who has received governmental permits which allow him to do no work on his land beyond grading it into lots, thereafter desires to construct residential buildings and other structures on that land. Must such a developer comply with the law in effect at the time he applies for his construction permits, or is he entitled to build whatever the prior law would have allowed despite the fact that he neither applied for nor received any construction permits under the prior law?

(2) Is it a denial of equal protection to deny a vested rights claim of exemption to one party when recognizing such a claim by another party for an adjoining parcel of land involving different facts? Moreover, can a court take cognizance of the equal protection issue when all the facts pertaining to the other party's claim are not introduced at either the trial court or appellate proceedings?

STATEMENT OF THE CASE

The proceedings in the California Court of Appeal involved review of an administrative decision by the California Coastal Zone Conservation Commission (hereinafter sometimes referred to as "Coastal Commission"). Appellant had applied, based on an asserted claim of having established vested rights, for an exemption from the permit requirements of the California Coastal Zone Conservation Act of 1972. Appellants' claim for exemption was denied and it is judicial review of such denial that appellant is pursuing in this proceeding. Said Act of 1972 was an interim statute which placed restrictions on development in California's coastal zone for an interim planning period while a comprehensive plan for the regulation and guidance of orderly development of the California coast was prepared. Such plan has now been prepared and has been adopted as California Public Resources Code sections 30,000 et seq. The interim Act of 1972 from whose permit provisions appellant sought to be exempted has now terminated by its own terms as of January 1, 1977, and is no longer in effect. (Former Public Resources Code section 27650).

The herein litigation constitutes judicial review of an administrative decision. Neither side supplemented the record of the agency proceedings as provided under California Code of Civil Procedure section 1094.5. Consequently,

judicial review has been limited to, and the sole evidence before the California courts and before this Court consists of, the administrative record of the proceedings before the California Coastal Commission.[1]

Appellant incorrectly and misleadingly states in its Jurisdictional Statement that it was not seeking a vested rights exemption to construct specific *buildings,* but that it was instead seeking a vested rights exemption to put the land to specific *uses* consistent with the zoning that was in existence on the property prior to the pasage of the Coastal Act of 1972. The fact is that in the administrative proceeding, and in the litigation before the California courts, the only dispute and the specific issue between the parties has been whether or not appellant Avco is exempted from the permit requirements of the Act of 1972 for the subdivision of land, and for the construction of:

(1) A specific number of residential structures that appellant claimed that it had plans for; and

(2) A golf course.

Throughout these proceedings, up to now, appellant consistently claimed that it had a vested right to construct these specific buildings and items. Only now, after having lost in the California courts, appellant phrases its claim for a vested right exemption in terms of a vested right to a "use", and states that the California Supreme Court is guilty of an "oversight" in not having recognized this.[2] Yet, if we look at the proceedings before the Califor-

1. References hereafter to pages in the administrative record shall be made as follows: "AR 32" shall mean page 32 of the administrative record.

2. Because the appellants have referred to the California Supreme Court opinion which the Court of Appeal here found dispositive, we have likewise directly referred to the Supreme Court opinion. Appellants have also appealed from that determination. See, No. 76-888.

nia Coastal Commission and before the California courts, the "use" to which they claim a vested right happens to be to subdivide and construct specific buildings and structures on the land. There has been no "oversight" by the California Supreme Court in this case which has been thoroughly briefed and argued before one administrative agency and thereafter before two separate California trial and appellate courts. None of these Courts ruled on the question of a vested rights claim to a "use" for the reason that such a question was not presented to them.

A vested right to be exempt from changes in law has to "vest" on or before the effective date of whatever new law is sought to be avoided. With respect to the Coastal Act of 1972, that date is November 8, 1972. Additionally, the California Supreme Court has also recognized a statutory "vested rights" exemption, really in the nature of a "grandfather clause", under the terms of the Act of 1972 itself. See California Supreme Court opinion below, 17 Cal.3d at 788-799. The cut-off date for the statutory exemption is February 1, 1973. Consequently, appellant's claim to a "vested rights" exemption, common law or statutory, has to be evaluated in terms of events and facts that existed prior to November 8, 1972, and February 1, 1973, respectively.

The California Supreme Court correctly stated the applicable law in the opinion which the California Court of Appeal found controlling, 17 Cal.3d at 791:

> "It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. (*Dobbins v. City of Los Angeles* (1904) 195

U.S. 223; *Trans-Oceanic Oil Corp. v. Santa Barbara* (1948) 85 Cal.App.2d 776, 784). Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied."

Since the permits which Avco had received for work on the land did not authorize any work beyond grading, and Avco had not done any work on the land beyond the commencement of grading, the Court of Appeal held that any vested right could not extend beyond that either.

The second question which Avco has presented in its Jurisdictional Statement is its assertion that because the Coastal Commission granted an exemption to the County Harbor District to complete public recreational facilities on an adjoining tract, it amounts to a denial of equal protection to deny Avco an exemption to build the structures and buildings on its tract. There are two difficulties with Avco's position on this issue. *First,* the County Harbor District's claim for exemption was a separate claim, based on separate facts, and the subject of a separate administrative proceeding. The record of that administrative proceeding is not part of the judicial record under review here with respect to Avco's claim for exemption. Consequently, on the basis of the record herein, it is not possible to make a fully-reasoned judgment on Avco's claim of denial of equal protection since we do not have all the facts as they were presented in the Harbor District's claim for exemption. Avco could have but did not offer to introduce the record of the Harbor District's exemption proceedings in this litigation. *Second,* to the extent that there is some partial information in the herein record concerning the County Harbor District's claim, certain factual differences

justifying different treatment of the two claims are apparent and indicate that other factual differences probably also existed.

THE QUESTIONS PRESENTED BY APPELLANT ARE SO INSUBSTANTIAL AS NOT TO REQUIRE FURTHER ARGUMENT. MOREOVER, ONE OF THEM IS FORECLOSED BY A PRIOR DECISION OF THIS COURT AND THE OTHER IS BASED ON ASSERTED FACTS WHICH ARE NOT IN THE RECORD OF ANY OF THE PROCEEDINGS IN THE COURTS BELOW

A. The California Court of Appeal's Ruling on Appellant's Claim to Vested Rights Is a Correct and Fair Ruling and Follows a Prior Decision of This Court

Appellant Avco has numerous tracts that it is developing in the same area of Orange County, including the subject Tract 7885. Some of these tracts, such as Tract 6988, Appellant Avco is subdividing and grading for the purpose of creating individual lots to be sold to other purchasers. Other tracts, such as the herein tract 7885, Avco asserts that its intent has been not only to create lots, but to also thereafter construct buildings on those lots, and only then sell off the property after the buildings have been constructed on the lots.

The *manufacture of lots* is a separate and distinct process from the construction of buildings on those lots thereafter. See, e.g., *Avner v. Longridge Estates* (1969) 272 Cal.App.2d 607. The manufacture of lots generally consists of grading the land, building roads to provide access to the land, bringing in utility lines for future hook-ups, and delineating individual lot lines. Appellant Avco had not gotten beyond the manufacture of lots stage for Tract 7885 either in the scope of governmental permits it has received for said land, or in the type and amount of work actually performed on the land.

In other words, if someone went to all the governmental offices having jurisdiction over Tract 7885, and examined Avco's applications for permits and the permits that have actually been issued, one would see that no governmental permits had either been requested by or issued to Avco beyond the manufacture of lots. Similarly, if one were to examine the physical state of the land in Tract 7885 and in Tract 6988, one would see no difference in the type or amount of activity on one and the other, and in both cases one would conclude that Avco was merely subdividing the land, i.e., manufacturing lots. One would have to conclude from all such available objective evidence that Avco's intentions did not differ from one tract from that of the other.

Yet, Avco now seeks a vested rights exemption to build buildings and structures on one of these tracts, Tract 7885, without having those buildings and structures comply with existing law, although Avco concedes that no such exemption is available for the other tract. The reason why Avco asserts it is entitled to such different treatment for one tract and the other is that for the one tract, Avco states that within its own *subjective state of mind*, i.e., within its own corporate structure, Avco had the previously undisclosed intent to build structures on it while on the other tract it did not have such intent.

Avco has sought an exemption, based on its claim of vested rights, from having to comply with existing law, for structures which no government agency to date has seen much less approved.[3]

The concept of vested rights is based in part on the equitable doctrine of estoppel: if the government causes another

3. *Meuser v. Smith*, 141 N.E.2d 209 (1956), relied upon by Avco is easily distinguishable. The governmental agency there at least knew precisely what was to be built, and had considered specific plans for the structures.

party to justifyably *rely* on its actions, then the government may be prevented from thereafter changing its position to the other party's detriment. But there must first be *reliance* on the government's actions, and therefore there must be government action. Such action consists of the government permits issued authorizing the party to commence construction. In this case the only authorizations issued to Avco do not go beyond grading of its land. Consequently, there can be neither justifiable reliance, nor estoppel, nor vested rights, beyond grading of the land. Estoppel is grounded on the objective conduct of the party sought to be estopped. Here Avco seeks to estop government not on the basis of government's conduct, but rather on the basis of its own subjective state of mind, its own previously unrevealed intentions.

How can the government be estopped from regulating, according to existing law, the construction of buildings which it has never seen, much less authorized?

This is a fair and a long-standing rule. The cases which the California Supreme Court cited in its opinion below have long been the rule. Appellant, a sophisticated developer, was very well aware of the extent to which it could rely, and beyond which its subjective intents would be subject to newly enacted laws. Indeed, the record discloses that even before the Coastal Act of 1972 was passed, while similar proposals were being considered by the California legislature, Avco made express provisions in its own future plans for the contingency of such a new statute and its effect on Avco's future plans for the land. See the administrative record at pp. A.R. 1354 and 1358-1359, where appellant Avco stated its intent to amend its obligations to subsidize property assessments for its tracts in the event any Coastal legislation affecting its land was passed, and thereafter did amend such obligations.

B. Appellant Has Not Stated a Valid Claim for Denial of Equal Protection Due to the Recognition of a Vested Rights Exemption for the Development of Another Parcel by the County Harbor District

It is axiomatic that there is no denial of the constitutional right to equal protection if two persons situated differently are treated differently. The Coastal Commission denied Avco's claim herein for vested rights and recognized the County Harbor District's claim to such vested rights for another parcel of property based on different facts. Additionally, although all the facts that pertain to the Harbor District's claim have at all relevant times been within Avco's possession, Avco has never sought to introduce them in these proceedings. The inference must therefore be drawn that such facts if introduced would have detracted from Avco's equal protection claim rather than supported it.

The County Harbor District's parcel consists of 34 acres [AR at pp. 211-213] adjacent to Avco's herein Tract 7885. Said 34 acre parcel was purchased by the County from Avco for the sum of $1,677,960 and the County also contracted to pay Avco an additional $883,292 to construct certain improvements thereon. Such improvements essentially consisted of preparing the beachfront parcel for park and recreation use by constructing a road and parking lot together with restrooms, lifeguard stands, one concession stand, one gate house, and associated landscaping, lighting, irrigation, and utilities.

Avco, as the County's agent under said contract, applied for a vested rights exemption for said parcel on behalf of the County. Consequently, Avco has at all times possessed all the facts pertaining to that vested rights claim. Yet, the only item of evidence that Avco has submitted in these proceedings on the Harbor District's claim is a copy of an

unsigned and unexecuted document contained in the administrative record at pp. AR 211-218, which appears to be a draft of a proposed resolution of South Coast Regional Commission to grant that parcel an exemption.[4]

From this document it appears, however, that work on the buildings and structures of the County Harbor District's tract was well along in progress, with some of the individual structures already completed as of the two dates relevant to a claim of exemption. See page AR 212 which states that the road and parking lot were completed on October 28, 1972. Landscaping, irrigation, and lighting were completed on October 27, 1972. One restroom and one gatehouse were completed on February 7, 1973. Work on the remaining structures was apparently in progress as of the date the claim for exemption was filed.

Avco in its Jurisdictional Statement claims that the grading for the two parcels had been done jointly. But the fact is that in the case of the Harbor District's parcel, much more than just grading had been completed or was in progress as of the two relevant dates. Avco's Tract 7885, on the other hand, had not gone beyond grading.

Additionally, Avco asserts that no building permits, i.e., construction permits for structures, had been issued for the Harbor District's parcel. The answer to this has to be two-fold. *First*, the evidence in the record concerning the Harbor District's parcel says nothing concerning whether

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4. In No. 76-888, the companion action, Avco asserted that the lack of information on this point should be construed against the Appellees. Avco relies on the California Supreme Court statement that the evidence before it "consisted entirely of the proceedings before the Commission." 17 Cal.3d at p. 790. The Court's reference there was only to the claims of exemption filed by Avco, *not* to the claim of exemption filed by the Harbor District. The proceedings involving the claim of exemption filed by the Harbor District are not part of the record below.

a building permit was issued or not. But since structures were being built, absent any evidence to the contrary, one must assume that the law had been complied with and all necessary permits had been obtained. *Second,* a "building permit" as such probably was not issued for the structures being built on the Harbor District's parcel and most likely none was required. The practice in most municipalities and counties in California is that permits such as building permits are usually not required for a municipalitie's own projects. In other words, a county does not normally issue itself a construction permit or a building permit. Instead, when the county's governing body reviews, approves, and authorizes its own project, it performs a review equivalent to and often much more exacting than when a county agency reviews a private applicant's application for a construction permit. In fact, the administrative record at page AR 211 indicates that the county passed a resolution authorizing the development on September 21, 1971. This would appear to be the usual type of action taken by a governmental entity in authorizing one of its own projects. Consequently, even if Avco should be correct that no building permit was issued for the structures being built on the county's parcel, and as we indicated, because of the incompleteness of the record we cannot even be sure of this, it would nonetheless appear that action amounting to the equivalent of issuing a building permit was taken by the County.

From the record in its present state the following facts appear to be true. Avco received county authorization to grade its land, was in the process of doing so, but had neither applied for nor received any permits to construct any buildings or structures and had not commenced any such construction. The Harbor District's parcel received

county authorization not only for grading the parcel, but also to build the structures and facilities necessary to make it into a recreational and park area, and the work was proceeding as of the relevant dates herein. Consequently, an exemption was granted to the County to complete all such structures and facilities. As far as the evidence in the record reveals, if the two parcels have been treated differently, it is because the underlying facts for each parcel are different. There has been no denial of equal protection.

CONCLUSION

For all the foregoing reasons, we respectfully move this Court to dismiss this appeal or, in the alternative, to affirm the judgment of the California Court of Appeal entered in this case for the reason that the questions presented in the Jurisdictional Statement are so insubstantial as not to need further argument.

Respectfully submitted,

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